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No. 90-1369

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

AMCA INTERNATIONAL FINANCE COMPANY, et al.,
Petitioners,

vs.

STEVEN K. HILGEDICK, etc., et al.,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.1 NOTICE

The list of parent companies and affiliates of petitioners is set forth in the petition for a writ of certiorari.

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PRELIMINARY STATEMENT

Respondents' brief is notable for what it does *not* say. While conceding that the parties' contracts were valid and lawful, respondents fail to explain how a multimillion dollar punitive damages award that was imposed on the basis of conduct that appeared to be permitted by the express terms of those contracts can comport with due process. Instead, respondents urge this Court to deny review on the ground that the questions presented in the petition were not properly raised below.

There is no merit to any of respondents' waiver arguments. Under California law, petitioners' "defensive" submission of an abstractly correct punitive damages instruction, in accordance with the trial court's refusal to take the issue of punitive damages from the jury, does not preclude petitioners from challenging that instruction on appeal. Nor, as a matter of state law, were petitioners required to raise their constitutional challenges to California's

punitive damages system in the trial court. These issues were briefed and argued in the California Court of Appeal, which ruled against petitioners on the merits, and they were presented to the California Supreme Court, which declined to grant review. Hence, these issues are properly before this Court.

Respondents' arguments as to why this Court should deny the petition on the merits also fail. Despite respondents' misleading discussion of California's standards for reviewing punitive damages awards, the fact is that the deferential "passion and prejudice" review conducted by the California Court of Appeal in this case provided little, if any, protection against unchecked jury discretion. In any event, regardless of the procedures followed by the jury and the courts in this case, imposition of an $8.5 million punitive damages award on the basis of conduct that appeared to be permitted by the express terms of lawful and valid contracts simply cannot be squared with the requirement of *Pacific Mutual Life Insurance Co. v. Haslip,* 59 U.S.L.W. 4157, 4162 (March 4, 1991) that punitive damages be "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition."[1]

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[1] Respondents present a lengthy and largely irrelevant "statement of the case," the thrust of which is that petitioners engaged in deliberate "mismanagement" of Pacific Trencher to benefit themselves and "destroy" respondents. *See* Resp.Br., pp. 1-14. However, the issue of alleged bad faith mismanagement of Pacific Trencher was a part of respondents' challenge to the validity of the security documents, and that issue was submitted to the trial judge who decided *against respondents* in all respects. Pet.Cert., App. D, pp. 5-9. That finding was expressly affirmed by the California Court of Appeal. Pet.Cert., App. A, pp. 21-23.

As respondents concede (Resp.Br., p. 13), the only cause of action submitted to the jury was that for interference with their contractual relations with Pacific Trencher. That cause of action pertained to the claim that petitioners' exercise of their various contract rights (*i.e.*, withholding rental payments to Steven Hilgedick, withholding equipment rentals to Hilgedick Rental, and refusal to guarantee Pacific Manufacturer's government contract) was tortious under California law. *See* RT I 193-194, 202-203, 211, 347; Pet.Cert., App. A, pp. 9, 12-16. Those acts provided the basis for tort liability in this case.

ARGUMENT

I

PETITIONERS' CONSTITUTIONAL CHALLENGES TO CALIFORNIA'S PUNITIVE DAMAGES SCHEME, AND TO THE PUNITIVE DAMAGES AWARD IN THIS CASE, ARE PROPERLY BEFORE THIS COURT.

Respondents advance several contentions in support of their claim that petitioners' constitutional challenges were not properly raised below. Resp.Br., pp. 14-18. None has merit.

First, respondents claim that, by requesting an instruction embodying an abstractly correct statement of California's traditional standards for determining punitive damages, petitioners have "invited [any] error" and are now foreclosed, as a matter of California law, from raising a constitutional challenge to those standards on appeal. Resp.Br., pp. 14-16. Respondents are incorrect. Petitioners have consistently maintained throughout this case that the evidence did not support an award of punitive damages, and they unsuccessfully sought to take the issue of punitive damages from the jury by motions for directed verdict and for judgment notwithstanding the verdict.[2] Petitioners proposed the instruction in question only when their attempts to obtain judgment as a matter of law on the punitive damages claims failed and it had become obvious that further objection would have been unavailing. In view of these facts, petitioners were permitted, as a matter of California law, to submit a

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[2] The judge who presided at the first trial ruled that there was *no* substantial evidence of malice or oppression, but he denied petitioners' motion for judgment notwithstanding the verdict as to punitive damages under the mistaken impression that to grant the motion would violate the "single final judgment" rule. CT 974, 977. Under California law, however, a trial judge has power to grant judgment notwithstanding the verdict as to portion of a verdict not supported by substantial evidence (*Gordon v. Strawther Enterprises, Inc.*, 273 Cal.App.2d 504, 515-516, 78 Cal.Rptr. 417 (1969)), including an unsupported award of punitive damages (*Trammell v. Western Union Tel. Co.*, 57 Cal.App.3d 538, 543, 556-558, 129 Cal.Rptr. 361 (1976)).

defensive instruction setting forth the state law without a waiver of the right to raise constitutional challenges in the higher courts:

> "It is settled that where a party is unable to induce the court to accept his view of the law, the fact that he requests instructions in accordance with the court's ruling does not preclude him from assigning error." *Masterson v. Pig'n Whistle Corp.*, 161 Cal.App.2d 323, 336, 326 P.2d 918 (1958); *accord, People v. Turner*, 50 Cal.3d 668, 704-705, n. 18, 268 Cal.Rptr. 706, 789 P.2d 887 (1990); *Williamson v. Pacific Greyhound Lines*, 93 Cal.App.2d 484, 487, 209 P.2d 146 (1949).

Contrary to respondents' contention (Resp.Br., pp. 16-17), petitioners have not waived their constitutional challenges to California's punitive damages scheme by failing to raise them in the trial court. Indeed, it would have been an idle act to assert such arguments because the California Courts of Appeal and the California Supreme Court have repeatedly rejected both federal and state due process attacks on California's punitive damages statute. *See, e.g., Bertero v. National General Corp.*, 13 Cal.3d 43, 66, n. 13, 118 Cal.Rptr. 184, 529 P.2d 608 (1974). Under these circumstances, petitioners were not required to raise their constitutional challenges in the trial court as a matter of state law. *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal.3d 287, 292, n. 1, 250 Cal.Rptr. 116, 758 P.2d 58 (1988) (defendant was not required to raise issue in lower courts because "clearly it was pointless for defendant to ask either the trial or appellate court to overrule one of our decisions").[3]

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[3] None of the cases cited by respondents (Resp.Br., pp. 16, 17) suggests that a litigant must first ask the trial court to rule contrary to established precedent before challenging that precedent in the higher courts. In *Kellis v. Ring*, 92 Cal.App.3d 854, 860-861, 155 Cal.Rptr. 297 (1979), the court noted that the constitutional question had been tardily raised but discussed the issue anyway and rejected it on the merits. The other California cases cited by respondents merely stand for the proposition that a party normally will not be allowed to change his theory of recovery on appeal where the new theory requires resolution of "controverted factual questions." E.g., *Bogacki v. Board of Supervisors*, 5 Cal.3d 771, 780, 97 Cal.Rptr. 657, 489 P.2d 537 (1971) (factual

In any event, petitioners' due process challenge to California's punitive damages scheme and to the punitive damages instruction in this case was briefed and argued in the California Court of Appeal, and that court addressed, and rejected, petitioners' constitutional arguments in its opinion. *See* Pet.Cert., App. A, pp. 41-43. "There can be no question as to the proper presentation of a federal claim when [the court below] passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959); *accord, New Jersey v. Portash*, 440 U.S. 450, 455 (1979).[4]

Also without merit is respondents' contention that petitioners never raised the question whether the punitive damages were unconstitutionally excessive as a matter of federal law. *See* Resp.Br., p. 18. Indeed, the manner in which petitioners framed this issue for the California Supreme Court could not have been clearer.[5] Thus, respondents are in all respects wrong in their

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question whether employee had been discharged for exercising free speech rights); *Parker v. City of Fountain Valley*, 127 Cal.App.3d 99, 116-117, 179 Cal.Rptr. 351 (1981) (factual question whether hearing officer was biased against discharged city employee in administrative proceeding for reinstatement).

[4] Respondents are incorrect that "[p]etitioners had no complaint about the jury instructions in the California Court of Appeal." Resp.Br., p. 15. To the contrary, petitioners argued that the punitive damages instruction was "vague and indefinite", and that the law upon which the instruction is based gave "no warning to defendants of the consequences of their acts." App.Opn.Br., p. 31, n. 13. Moreover, petitioners joined in the argument by Amicus Curiae, the Northern California Association of Defense Counsel, that the punitive damages instructions given in this case and in California generally were unconstitutionally vague. App.Reply Br., p. 25; *see* NCADC Amicus Br., pp. 14-21.

[5] "Do the Due Process Clauses of the California and United States Constitutions place an outer limit on awards of punitive damages that are grossly disproportionate to the harm caused and far in excess of any amount necessary to punish and deter." Pet.Rev., p. 2; *see id.* at 25-27.

assertions that petitioners have waived their constitutional challenges to the punitive damages award.[6]

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[6] Respondents correctly note that the third issue presented in the petition—whether the imposition of tort liability in this case violates due process—was not specifically raised below. Resp.Br., p. 18, n. 2. However, issues pertaining to the imposition of tort liability were raised, as were issues pertaining to due process requirements of notice prior to the imposition of liability for punitive damages. Hence, even though the precise issue was not previously argued, this Court may "dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court." *Stanley v. Illinois,* 405 U.S. 645, 658, n. 10 (1972).

Respondents' discussion of the merits of this question (Resp.Br., pp. 18-19, n. 2) requires only brief comment. First, respondents misstate petitioners' position. The issue presented is not whether petitioners' conduct was "lawful" under state law. Rather, the issue is whether a state may impose tort liability for conduct that appears to be permitted by lawful contracts between the parties "where the state law in effect when the conduct occurred gave no warning that such conduct was prohibited." Pet.Cert., p. 3. Respondents admit that the contracts in issue were lawful (Resp.Br., p. 19, n. 2), and there was no evidence that petitioners, at the time they exercised their contract rights, had any notice that those acts might be determined by a jury to be wrongful under California law. That petitioners stipulated that the liability instructions contained a correct statement of California law (*see* Resp.Br., p. 19, n. 2) is irrelevant. As noted above (pp. 3-4), under California law, a "defensive" stipulation that an instruction correctly states the law does not waive an objection that the instruction is inapplicable under the facts of the case. Neither does it preclude the agreeing party from arguing that there is no basis for the imposition of liability. *Masterson v. Pig'n Whistle Corp., supra,* 161 Cal.App.2d at 336; *Winkler v. So. Cal., etc. Medical Group,* 141 Cal.App.2d 738, 746, 297 P.2d 728 (1956).

II

THE PUNITIVE DAMAGES AWARD IS CONSTITUTIONALLY INFIRM BECAUSE (A) IT WAS IMPOSED IN THE ABSENCE OF MEANINGFUL PROCEDURAL SAFEGUARDS; AND (B) IT IS EXCESSIVE AS A MATTER OF SUBSTANTIVE DUE PROCESS.

Respondents argue that the instructions given in this case "guided the jury with a great deal more precision" than the instruction at issue in *Pacific Mutual,* and that therefore the massive award of punitive damages inflicted on petitioners passes constitutional muster. Resp.Br., pp. 19-24. Respondents' argument is fundamentally flawed.[7] In *Pacific Mutual,* the punitive damages award survived scrutiny largely because it had been subjected to rigorous review by the trial court and, more importantly, by the Alabama Supreme Court. "This appellate review ma[de] certain that the punitive damages [were] reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 59 U.S.L.W. at 4162.

By contrast, in the present case, and in California generally, appellate courts review punitive damages awards by considering

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[7] The validity of respondents' premise—that the jury instructions in the present case adequately constrained the jury's discretion in determining how large an award to impose—is also flawed. The jurors in this case were told that there were "no fixed standards" to follow in setting the amount of punitive damages, and that they were simply "to consider" three factors in determining how large a sanction was appropriate. RT II 2075; *see* Pet.Supp.Br., App. A. Petitioners have already explained why these vague and subjective factors failed to provide a constitutionally adequate limit on the jury's power to punish. Pet.Cert., pp. 14-18. We see no need to repeat these points here.

Respondents contend, however, that the instructions limited the jury's ability to determine the amount of a punitive damages award by telling the jurors that they could award such damages only if they found petitioners had acted with malice or oppression. Resp.Br., pp. 21-22. Respondents miss the point. Requiring the jury to find evidence of a particular mental state as a prerequisite to awarding *any* punitive damages does nothing to constrain the jury's discretion to determine the *size* of such an award.

the same vague and open-ended factors that juries apply in awarding such damages in the first place; namely, the "reprehensibility" of the defendant's conduct, the defendant's financial condition, and whether the ratio between the compensatory and punitive damages is "reasonable." *See Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 387-388, 202 Cal.Rptr. 204 (1984); *Rosener v. Sears, Roebuck & Co.*, 110 Cal.App.3d 740, 750-752, 168 Cal.Rptr. 237 (1980). Moreover, the power of California appellate courts to control undue jury discretion is limited by the deferential "passion and prejudice" standard of review which, as this Court recognized in *Pacific Mutual* (59 U.S.L.W. at 4162, n. 10), provides an inadequate safeguard against excessive punitive damages.

Respondents apparently recognize the deficiencies in California's system of appellate review because they erroneously assert that, in reviewing punitive damages awards, California courts regularly apply a set of substantive standards—which respondents denominate the "*Grimshaw* standards"—that are supposedly akin to the standards applied by the Alabama Supreme Court in *Pacific Mutual*. Resp.Br., pp. 25-27; *see also, id.* at 15, 16. This is simply not true. The so-called "standards" are suggested by a law review article cited in a footnote in *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 819, n. 14, 174 Cal.Rptr. 348 (1981). They were not adopted as a test in *Grimshaw* and *no reference to them has been made in any other reported California appellate decision.*[8] To claim that petitioners could have received the benefit of these "standards" simply by asking for them is disingenuous at best.

Even if this Court were to conclude that the procedures followed by the jury and reviewing courts in this case were not constitutionally deficient, there remain for decision the questions whether the Due Process Clause imposes substantive constraints on the size of punitive damages awards in civil cases, and whether

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[8] Indeed, the terms "*Grimshaw* review," "*Grimshaw* standards" and "*Grimshaw* instruction" that respondents declare to be "as familiar as an old shoe" (Resp.Br., p. 25; *see also, id.* at 15, 26) do not appear in *any* reported judicial opinion in California.

the huge award in this case exceeds these limits. *See* Pet.Cert., pp. 21-25; Pet.Supp.Br., pp. 5-6. Rather than confront the merits of these important constitutional questions, respondents attempt to sidestep them by misstating petitioners' argument. Petitioners do not claim that the ratio of punitive to compensatory damages is itself determinative of the excessiveness issue, nor do petitioners suggest that excessiveness may be analyzed in the abstract, "apart from the facts of the case." Resp.Br., p. 26. To the contrary, petitioners urge this Court to look at the facts in resolving the excessiveness issue because they reveal the type of extreme results that occur under California's standardless system of civil punishment: after the first trial judge ruled that the evidence did not support *any* punitive damages, a second jury imposed an $11 million punitive damages award (which was remitted to $8.5 million) to sanction petitioners for engaging in conduct that, on its face, was permitted by the express terms of valid and lawful contracts. If this scenario does not portray "punitive damages that 'run wild' " (*Pacific Mutual Life Insurance Co. v. Haslip, supra,* 59 U.S.L.W. at 4161), petitioners do not know what does.

Respondents attempt to justify this incredible result by claiming that the punitive damages award is "less than the actual injury inflicted by petitioners." Resp.Br., p. 28. The jury, however, determined that the actual damages suffered by all three respondents totaled $730,482.10 (CT 959), a mere fraction of the $8.5 million punitive damages award imposed on petitioners.[9] Respondents now attempt to inflate the amount of actual damages by referring to Pacific Trencher's gross receipts and Mr. Hilgedick's alleged "personal worth," and by speculating about certain contracts that *may* have been awarded to Pacific Trencher and Pacific Manufacturing in the future. Resp. Br., pp. 28-30. Such speculation is inappropriate here. Evidence of these matters was

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[9] Respondents try to downplay the glaring disparity between the punitive and compensatory damages in this case by falsely implying that in *Pacific Mutual* this Court approved an award of punitive damages that was 200 times as large as the compensatory damages. Resp.Br., p. 28. The ratio of punitive damages to compensatory damages in *Pacific Mutual* was not 200 to 1 but *4 to 1*, a ratio that this Court considered to be "close to the line." 59 U.S.L.W. at 4163.

put before the jurors, who presumably considered it in making their award.

CONCLUSION

For the reasons stated above and in petitioners' supplemental brief and petition for a writ of certiorari, petitioners respectfully request this Court to grant the petition for a writ of certiorari.

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